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Petitioner's Reply Brief

Although respondent now claims that* its entire business is transacted in Chicago, we should nevertheless like to call the Court's attention to a *Finding of Fact* wholly inconsistent with its present contention, to be found in the Record filed in this Court in an earlier suit between the same parties.

We refer to the *Findings of Fact* appearing on pages 35 and 42 of *Volume I* of the printed Transcript of Record filed in this Court on June 13, 1936 on the Stewart-Warner Corporation's Petition for Writ of Certiorari to review the decision in *Stewart-Warner Corporation* vs. *Jiffy Lubricator Co.*, 81 F.2d 786 (CCA-8), which Petition for Writ of Certiorari was docketed in this Court as No. 114 of the October Term 1936 (certiorari having been denied at 299 U.S. 544):

> "Finding of Fact and Conclusions of Law of District Court."
>
> "The Court having considered the files, records and proceedings herein, the evidence produced at the trial of the above entitled action and the arguments of counsel, now makes and files its Findings of Fact and Conclusions of Law as follows:
>
> "Findings of Fact"
>
> "I. Plaintiff, **Stewart-Warner Corporation**†, is a corporation organized and existing under and by virtue of the laws of the State of Virginia, a citizen of Virginia, a resident of and **having its principal place of business at Richmond, Virginia**†, and a regular and established place of business in Chicago, Cook County, State of Illinois." (R.p. 35)
>
> . . . . . .
>
> "Dated March 18th, 1935." "ANDREW MILLER
> United States District Judge"
>
> "Endorsed on the face as follows: Filed Mar. 18, 1935. J. A. Montgomery, Clerk." (R.p.42)

* while it is admittedly a Virginia corporation and good service was admittedly had upon it in the Eastern District of Virginia

† emphasis supplied.

Appealability of District Court's "Final Order Transferring Venue" (R.p. 72)

In the case of *Cohen* vs. *Beneficial* (337 U.S. 541) decided no longer ago than the close of last term, this Court had to deal with the appealable character of action taken under a statute requiring the plaintiff to give a bond as a condition of maintaining suit. The case is too recent to need recapitulation now, but it establishes that despite the literal meaning of the Statute*, this Court has construed this Statute* practically rather than technically, allowing immediate review of that "small class" of cases

> "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction." (citing cases)

The theory of the decision is found in the preceding paragraph of this Court's aforesaid opinion. The order held appealable, said this Court, was no part of, no tentative step toward, that final judgment which should ultimately dispose of the merits of the whole case. Moreover, when that is reached

> "it will be too late effectively to review"

the order under consideration

> "and the rights conferred by the statute"

i.e., the statute requiring the plaintiff to give bond

> "will have been lost, probably irrevocably".

* Sections 1291 and 1292 of Title 28 of the U.S. Code

And in concluding, the Court held that the order under consideration was:

> "appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it".

The analogy between the *Cohen* and the present case is clear and perfect. In the case at bar the petitioner was, as Cohen might have been, finally turned out of Court. Petitioner at bar was sent to another jurisdiction and the harm done can be corrected by no subsequent review of this case. We submit that the right—to remain where he lawfully was—is, in the language of the *Cohen* case,

> "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated".

While in its recent (January 4, 1950) decision in the case of *Magnetic Engineering & Mfg. Co.* vs. *Dings Mfg. Co.*, F.2d (84 USPQ 105), the Court of Appeals for the 2nd Circuit undoubtedly agreed with the 4th Circuit's decision in the case at bar, yet we call attention to the dissenting opinion in that case, as we believe it is in harmony with this Court's decision in the *Cohen* vs. *Beneficial Industrial Loan Corp.* case, *supra,* and because such dissenting opinion also shows the complications and impasse which can result from a failure to give immediate appellate review to an order transferring a case *to a different Circuit.* For the convenience of the Court we therefore quote the following from the dissenting opinion in the *Magnetic* vs. *Dings,* case, supra:

> ". . Congress, when it recently substituted a transfer order for an order of dismissal previously used (under the forum non conveniens doctrine) in cases like this, almost surely did not plan such a result, i.e., I think that Congress did not have in mind that the transfer order would be interlocutory and non-appealable. I think, therefore, that a sense of justice should

prompt us to grant relief, if possible, by way of mandamus. For if, on the facts here, the transfer order was improper, plaintiff may be seriously hurt, should he be obliged to wait, for a vacation of reversal of that order, until the completion of a trial in Wisconsin. Indeed, paradoxically, if he must thus wait, the hurt to him, caused by the transfer, will be wholly irremediable."

. . . . . .

"I grant that a court's sense of justice should not induce it to ignore limitations on its power imposed by statute or by precedents so well established that it would be improper to alter them judicially. But I see no such barriers here. I find nothing in the legislative history or wording of the statute as to writs of mandamus nor in any decisions construing that statute, which compels the undesirable conclusion at which my colleagues have apparently arrived."

"There is one sentence in my colleagues' opinion which perhaps intimates that, were the impropriety of the transfer order sufficiently glaring, we could issue the writ, but that, absent such glaring facts, it is much to be preferred that the Seventh Circuit consider whether a writ should issue. Even if this restricted interpretation of my colleagues' opinion is correct, I disagree. For I perceive no reason why the Seventh Circuit can better decide the issue than can we. After all, the removal order was made by a district court within this Circuit. And, if the Seventh Circuit does issue a writ, the situation will become involved: That Circuit Court will direct the district court in Wisconsin to re-transfer the case to the court below. But the court below will not be subject to a re-transfer order entered by the Seventh Circuit, and might, refusing to comply with that order, again transfer the case to Wisconsin. Perhaps, in those circumstances, we would intervene, and, probably feeling obliged to follow the Seventh Circuit's determination, would by mandamus, direct the court below to hear the case. Such is the complicated procedure which my colleagues' decision opens up as a possibility. I fail to understand why we should require such an involved procedure instead of ourselves determining at once whether the order of the lower court was within its discretion. We can do so now, for all the facts bearing on the propriety of that order are in the record now before us."

Respondent's brief misrepresents petitioner's position

Under *Question 3* of the Petition and corresponding *Argument-Point 4* of the Brief filed in support thereof, petitioner has taken the position that where the decisional law or case-law of the Circuit to which the movant under 28 U.S.C. 1404-a seeks to transfer venue is distinctly more favorable to the movant and correspondingly less favorable to the plaintiff opposing the transfer, such transfer is "not in the interest of justice";—petitioner's uncontroverted Johnson affidavit (R.pp. 61-64) and the arguments of respondent's counsel in the companion case (R.pp. 64-71; especially pp. 68-71) conclusively showing that, *in respondent's view,* the decisional law* in the 7th Circuit is distinctly more favorable to respondent and less favorable to petitioner.

Under *Point III* of respondent's brief, counsel misrepresent petitioner's position on this Point as a charge of prejudice on the part of or disqualification of the Judges of the 7th Circuit and then equally fallaciously suggests that this is an unwarranted attack upon the Judges of that Circuit. Petitioner, of course, has never even intimated any such thing. The intimation would be absurd from any point of view. To impute it to petitioner is unwarranted and unfair.

Petitioner's position is simply this: if the law is different in the several Districts or Circuits in which this action might be brought, Congress by adopting Section 1404(a) never intended to force petitioner to trial in a District or Circuit in which the law* is unfavorable to petitioner and favorable to respondent.

Companion case of Alemite vs. Jiffy now before this Court on a Petition for Writ of Certiorari filed January 14, 1950

On page 2 of the respondent's Brief in opposition, respondent alludes to the fact that in the companion case of

* *Stewart-Warner* vs. *Lincoln* 15 F.Supp. 571 and 16 F.Supp. 778 and 31 USPQ 195, and *Lincoln* vs. *Stewart-Warner* 91 F.2d 757 (CCA-7), and *Alemite Corporation* vs. *Grease-Rite Corporation,* Equity No. 9812 (DC ND Ill)

Alemite Co. vs. *Jiffy Lubricator Co.* 176 F.2d 444 (CA-8), petitioner's patent here in suit was held invalid.

Attention is called to the fact that on January 14, 1950, a Petition for Writ of Certiorari and Brief in support thereof were filed in this Court in the aforesaid companion case and the case was docketed as No. 543 of the October Term, 1949.

Conclusion

In conclusion it is respectfully submitted that this case is one in which a writ of certiorari should be granted.

Respectfully submitted,

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